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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK JOSEPH SACCHINELLI,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF BY THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether or not the Georgia Court of Appeals properly affirmed the denial of Petitioner's motion to suppress evidence?

2.

Whether or not Petitioner has standing to challenge the constitutionality of subpoenas issued to third parties, requesting information pertaining to their records relating to the Petitioner?

3.

Assuming arguendo the need to examine the sufficiency of the affidavit tendered

in support of the Cobb County Police application for electronic surveillance, whether or not the affidavit was sufficient when it contained some inaccuracies, but when there has been no showing of deliberate or intentional misrepresentation or reckless disregard for the truth?

4.

Whether, in the complete absence of any showing of governmental misconduct which arises to the level of shocking the conscience, this Court should find Petitioner's conviction violates due process as a result of any actions taken by the Cobb County Police or District Attorney?

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PART ONE

STATEMENT OF THE CASE

The Petitioner, Frank Joseph Sacchinelli was indicted,along with co-defendant Walter Arthur Parker, by the August Term, 1980 Bartow County Grand Jury for violating Georgia's Controlled Substances Act. Petitioner and his co-defendant were charged for possession of 1,995 pounds of marijuana with intent to distribute same. Following a jury trial on December 2, 3, and 4, 1980 Petitioner and his co-defendant were found guilty, and on December 15, 1980 Petitioner received a ten

year sentence (nine years incarceration, one year probated) plus a $10,000.00 fine. (R. 337-338; TT. 269). [1] On appeal to the Georgia Court of Appeals Petitioner's conviction and sentence were affirmed. Sacchinelli v. State, 161 Ga. App. 763, ___S.E.2d___ (1982). Petitioner's state application for a writ of certiorari was denied by the Georgia Supreme Court on April 21, 1982. (Petitioner's Appendix A; Petitioner's Appendix of certified copies of Supreme Court decisions and exhibits, p. 1). On May 18, 1982, the Georgia Supreme

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1/ References to the pagination of the official record from the Superior Court of Bartow County shall be referred to as (R. ___). References to the pagination of Petitioner's trial transcript shall be referred to as (TT. ___). References to the pagination of the transcript of Petitioner's motion hearings shall be referred to as (MT. ___).

Court denied Petitioner's motion for rehearing. (Petitioner's Appendix of certified copies of Supreme Court decisions and exhibits, p. 2). Thereafter, on July 17, 1982, Petitioner filed his present petition for a writ of certiorari in this Court.

PART TWO

STATEMENT OF THE FACTS

Petitioner and his co-defendant, Walter A. Parker, were arrested at an airport in Bartow County, Georgia at approximately 10:30 p.m. on May 6, 1980, after police authorities had observed their suspicious behavior and had confirmed that Petitioner and his co-defendant had landed their aircraft and unloaded approximately 1,000 pounds of marijuana. (TT. 47-62, 125-129).

At the airport at the time of the arrest was Mr. C. W. Moore, a patrol officer with the United States Customs Service; Mr. David Hallman, a Special Agent with the Georgia Bureau of Investigation; Mr. Don Phillips, a Cobb County Police Narcotics Agent, and Mr. Ron Coleman and Mr. James Garmon, Narcotics Agents with the Bartow County Sheriff's Department. (MT. 159, 169, 209, 218-219, 287, 345).

Prior to Petitioner's trial he filed a motion to suppress evidence which had been seized at the scene of the crime and at his apartment, claiming that his arrest and the subsequent seizures had been the direct result of an illegal wiretap and an illegal seizure of documents consisting of messages and telephone numbers from an answering service

that the Petitioner had utilized. (R. 25-26, 30-31, 108-111, 147-154; MT. 159-1470).

Testimony which was given during the extensive motion to suppress hearing showed that the Georgia Bureau of Investigation and Cobb County Police Officials first became aware of Mr. Sacchinelli in November of 1978 when an investigator from the Drug Enforcement Administration became suspicious of Mr. Sacchinelli at the Atlanta, Georgia Airport and learned that he was carrying $100,000.00 cash in a briefcase. The Drug Enforcement Administration attempted to maintain surveillance of Mr. Sacchinelli when he arrived in Miami; however, they were unsuccessful. (MT. 362, 369). The agent from the Drug Enforcement Administration later contacted officials from the Georgia Bureau of Investigation and Cobb County in an attempt to gain

some background information. (MT. 363, 369, 403, 699).

Between November 1978 and November 1979, the investigation of Mr. Sacchinelli consisted basically of an exchange of information between the Drug Enforcement Administration, the Georgia Bureau of Investigation, and the Cobb County Police. In November of 1979 a pen register was attached to Petitioner's home telephone by Agent Pierce of the Cobb County Narcotics Squad. (MT. 363). Based upon the telephone numbers derived from the pen register and the police authority's knowledge of individuals to whom Petitioner placed calls, an application was considered for a wiretap; however, before the wiretap could be implemented Petitioner's phone had been disconnected. (MT. 363).

At this point, Petitioner also became of interest to the United States Customs Service. On January 17, 1980, a Cessna 310 airplane, bearing the tail number 69673 was intercepted by the United States Customs Service as the aircraft was making an illegal entry into the United States. (MT. 363, 466, 471). The suspect aircraft was tracked to Anderson, South Carolina. While in Anderson, the plane evaded an attempt to block it on the runway and was able to take off. As a result thereof, the Customs Service contacted sheriffs' departments in north Georgia and posted a lookout in reference to that particular aircraft. (MT. 471, 472).

Customs Agent Robertson, who testified at the suppression hearing, stated that his investigation revealed that the aircraft had been sold to Petitioner Sacchinelli who had an address in Smyrna, Georgia which is located in Cobb County.

Upon proceeding to Sacchinelli's apartment, Agent Robertson found a folded piece of paper taped to the apartment door which read, "To whom it may concern." Upon lifting the fold in the paper, the officer read further, "U.S. Customs DEA and FAA, suck shit. Everybody else call me on my beeper." (MT. 472-472).

On February 26, 1979, GBI Agent Padgett received a call from Customs Agent Robertson in Atlanta, Georgia informing him that Petitioner Sacchinelli's plane was located at hangar 14 in the Bartow County Airport. GBI Agent Padgett and Lieutenant Kahealey of the Cobb County Police Department then drove to the airport and confirmed that Petitioner Sacchinelli had rented aircraft hangar 14, and that an airplane numbered N69673 was housed in that hangar. (MT. 363-364).

GBI Agent Padgett then called Mr. Harold Briscoe, a United States Customs Agent in the Service's Air Wing Section, who informed him that the information about the plane had originated from a Drug Enforcement Administration office in Louisville, Kentucky and Special Agent Harold Brown. Upon contacting Agent Brown, GBI Agent Padgett learned that Brown had information that Mr. Sacchinelli's airplane would be leaving the United States sometime within the following four or five weeks to obtain approximately 200 pounds of cocaine, and that a surveillance would reveal that the plane would return to either the North Georgia area or Southern Tennessee. (MT. 364). According to GBI Agent Padgett, surveillance began at the Bartow County Airport prior to the implementation of any wiretap. (MT. 369, 817). The application for electronic surveillance was made by local police authorities

with the aid of the GBI and the Cobb County District Attorney's Office on February 26, 1980. (MT. 708-709, 752, 778-780, 818-823). On February 28, 1980, the first conversations were monitored pursuant to the authorized surveillance, and the surveillance was ultimately terminated after one extension on April 4, 1980 and was determined to be unsuccessful. (MT. 432, 718-719, 747-748). According to GBI Agent Padgett, Cobb County Narcotics Agent Phillips and former Cobb County Narcotics Agent Pierce nothing was obtained either from the wiretap of Petitioner's telephone or as a result of a subpoena issued on the Northwest Answering Service which led police authorities to the arrest of the Petitioner at the Bartow County Airport. (MT. 272-273, 277, 368, 369, 382, 409, 428, 432, 718-719, 737, 748).

Surveillance was maintained on the aircraft in Bartow County, and flights of the aircraft were observed on May 2, 1980. (MT. 226, 364-365; TT. 4). After returning to Bartow County, both Petitioner Sacchinelli and co-defendant Parker rode in an automobile and surveyed both ends of the runway. (MT. 231, 233). Activity continued on and around the airplane on May 4, 1980. (MT. 228, 365). When GBI Agent Padgett arrived at the airport on Monday, May 5th he discovered that the plane was gone. (MT. 236, 366). Padgett then contacted the GBI Smuggling Squad Commander, Michael Eason and requested that he call the Customs Service to inquire about Sacchinelli's plane. (MT. 366, 465). Undercover agents from the Customs Service verified that Petitioner's plane and Petitioner were on the South Caicos Island in the Caribbean. (MT. 237, 278, 345, 477, 486).

Thereafter, following a meeting between law enforcement officials from the Georgia Bureau of Investigation, the Cobb County Police and the United States Customs Service, it was decided that GBI Agent Padgett and Cobb County Police Lieutenant Kahealey would proceed to an airport at Madisonville, Tennessee while GBI Agent Hallman, Customs Patrol Officer Moore and Cobb County Narcotics Officer Phillips proceeded to maintain surveillance at the Bartow County Airport. (MT. 219, 366, 420, 475; TT. 5). At approximately 7:30 p.m. on May 6, 1980, two Bartow County Sheriff's Deputies who were also part of the surveillance team drove to the north end of the runway at the Bartow Airport. They observed no vehicles or bails of marijuana. (TT. 29, 30). After checking the runway no other aircraft landed or departed from the airport property until an aircraft landed

at 10:30 p.m. (TT. 30, 31, 49, 50). As the aircraft landed, GBI Agent Hallman identified it as a Cessna 310, matching the description of the plane they had been waiting for. (TT. 47; MT. 162). The aircraft stopped after turning off the runway, turned off its lights and shut down the engines. (TT. 48, 51; MT. 162). The airplane remained in that position at the end of the runway for approximately fifteen minutes. (MT. 162). During that time Agent Hallman heard a thump. (TT. 52). Agent Hallman saw no activity away from the silhouette of the aircraft. (TT. 76). His vision behind the aircraft was obstructed by the airplane itself. (TT. 89, 95, 299). The plane then started its engines, turned on its lights

and taxied south. (TT. 52-53, 60; MT. 162).

Agent Hallman then moved to where the aircraft had stopped and discovered large bales of marijuana in nylon sacks partially covered by a poncho. Other items found at the scene included a bladder gasoline tank, an emergency kit, a hose, a plastic jug, tissue, a pump and flashlights. (TT. 54, 63, 67, 68, 72, 164).

Petitioner Sacchinelli exited the aircraft when it arrived at the hangar. He was stopped by Cobb County Police Agent Phillips, who had been in radio contact with Agent Hallman while the aircraft had been at the north end of the runway. (TT. 50, 127, 241; MT. 219-220).

Petitioner's co-defendant Parker was ordered from the aircraft by other officers, who engaged in a pat-down

search, removing a gas cap from his pocket. (TT. 31, 34, 35; MT. 221, 287-88, 328). The bladder tank found at the scene was missing the gasoline cap. (MT. 196, 323-324). Both subjects were detained, then arrested, after confirmation that marijuana had been found at the end of the runway. (MT. 131, 246). The aircraft was then searched after the arrest and numerous items including maps, charts, flashlights, a life raft, a piece of wood, and plastic tubing were seized. (MT. 131; TT. 123, 138, 140, 145-146, 250).

Upon conclusion of the pretrial suppression hearing, the trial court ruled that the arrest of Petitioner and his co-defendant was based upon information obtained from an independent and separate source other than the electronic surveillance and the Cobb County subpoenas

which had preceded it. (MT. 1477).

At Petitioner's trial, no conversations obtained from the electronic surveillance were played, nor was any of the content discussed in testimony. All testimony was limited to information obtained from sources other than the electronic surveillance.

Additional facts may be related in the following portion of this brief to more fully explain Respondent's arguments.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. SINCE THE ARREST OF THE PETITIONER AND THE SEIZURE OF EVIDENCE AT THE SCENE OF HIS ARREST RESULTED DIRECTLY FROM INFORMATION WHICH HAD BEEN OBTAINED FROM SOURCES NOT CHALLENGED IN PETITIONER'S MOTION TO SUPPRESS, THE GEORGIA COURT OF APPEALS PROPERLY FOUND NO MERIT TO PETITIONER'S FOURTH AMENDMENT CLAIM.

Petitioner's first argument in support of the writ asserts that the evidence at his trial overwhelmingly demonstrated that evidence seized at the

Bartow County, Georgia airport at the time of his arrest was the direct result of the illegal usage of subpoenas by the Cobb County Police, and that in reviewing the Fourth Amendment issue on direct appeal, the Georgia Court of Appeals erroneously applied an "any evidence" test in holding that an independent, untainted source of information led police to Petitioner's arrest, thus obviating the need to suppress the evidence which had been seized.

Petitioner's second argument asserts that an additional, independent reason for the granting of his motion to suppress, is based upon an insufficient affidavit attached to the application for a wiretap of Petitioner's telephone, which had been submitted by the Cobb County Police. Petitioner asserts that the affidavit of former Cobb Police Officer Pierce included information obtained

from the usage of invalid subpoenas, contained deliberately false information, was insufficient to show criminal activity, and contained stale information.

On direct appeal of Petitioner's case, the Georgia Court of Appeals found that while there was some information to support Petitioner's arguments that his arrest resulted directly from information gained through an abuse of the subpoena power, and as a result of a wiretap based on allegedly false swearing, the court also found that the evidence was sufficient to support the trial judge's conclusion that there were also sufficient separate, untainted sources of information which could and did lead police authorities to the arrest of the Petitioner and his co-defendant. Holding that the trial judge's findings would not be disturbed unless clearly erroneous, the Court of Appeals affirmed the trial court's denial

of Petitioner's motion to suppress. Sacchinelli v. State, 161 Ga. App. 763, 764-765, ___S.E.___ (1982).

Contrary to Petitioner's assertions, the Georgia Court of Appeals correctly applied the law to the facts of this case. In Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), this Court recognized that an exception to the Fourth Amendment exclusionary rule could result in situations when the police gained knowledge of incriminatory evidence from independent sources other than those which have been tainted by Fourth Amendment violations. The Silverthorne doctrine was cited approvingly in Nardone v. United States, 308 U.S. 338, 341 (1939).

Of course, as Petitioner notes, the exclusionary rule may bar evidentiary "fruit" which has been obtained as a direct result of an illegal search or illegal

coercive interrogation. Wong Sun v. United States, 371 U.S. 471, 485 (1963). However, as was noted in Wong Sun, that case was not concerned with a situation where the exclusionary rule had no application, because the government had learned of the incriminatory evidence from an independent source. Id., at p. 487. In Wong Sun this Court specifically stated:

> We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Id., at p. 487-488, quoting, R. Maguire, Evidence of Guilt, 221 (1959).

As noted previously, there is an insufficient connection between a primary

illegality and the ultimate seizure of evidence when the ultimate seizure of the derivative evidence flows from an independent, untainted source. Silverthorne Lumber Co. v. United States, supra; United States v. Ceccolini, 435 U.S. 268, 274 (1978); United States v. Brookins, 614 F.2d 1037, 1041-1042 (5th Cir. 1980); United States v. Houltin, 556 F.2d 1027, 1031 (5th Cir. 1978), cert. den., 439 U.S. 826 (1978). An additional category of insufficient connection occurs if the derivative evidence would inevitably have been discovered during a police investigation without the aid of the illegally obtained evidence. United States v. Brookins, supra, at p. 1042, 1044; United States ex rel. Owens v. Twomey, 508 F.2d 858, 865-866 (7th Cir. 1974); see also, Brewer v. Williams, 430 U.S. 387, 406, n. 12 (1977).

The Georgia Court of Appeals correctly applied the clearly erroneous standard in reviewing the trial court's determination on the motion to suppress. Upon review of the denial of a motion to suppress after conviction, the evidence must be viewed in a light most favorable to the government. United States v. Henry, 615 F.2d 1223, 1230 (9th Cir. 1980) [cases cited]. An appellate court should not overturn the trial judge's findings on a motion to suppress unless his findings are clearly erroneous. Id., at p. 1230; United States v. Sierra-Hernandez, 581 F.2d 760, 764 (9th Cir. 1978), cert. den., 439 U.S. 936 (1978); United States v. Smith, 649 F.2d 305, 309 (5th Cir. 1981); United States v. Berd, 634 F.2d 979, 986 (5th Cir. 1981); United States v. Miller, 589 F.2d 1117, 1130 (1st Cir. 1978), cert. den., 440 U.S. 958 (1979); United States v. Buettner-Janusch, 646 F.2d 759, 764

(2nd Cir. 1981), cert. den., ___U.S.___, 102 S.Ct. 126 (1981).

Although Petitioner argues that he would not have been located at the Bartow County, Georgia airport if the police had not obtained information as a result of the issuance of illegal subpoenas to the Northwest Answering Service and as a result of an allegedly, illegal wiretap; it is clear from the totality of the evidence, and as reflected in the aforesaid statement of facts, that the independent investigation and surveillance of the Petitioner by the Drug Enforcement Administration and United States Customs Service, gave the Georgia Bureau of Investigation completely independent information which ultimately led to the surveillance of the Petitioner and his aircraft, and his resulting arrest accompanied by the seizure of of marijuana and other items connecting

him with the violation of Georgia's Controlled Substances Act. Although Petitioner argues the insufficiency of the evidence showing an independent, untainted source of information which led the police to the Petitioner; nevertheless, as the aforesaid statement of facts shows, there was more than sufficient evidence to support the findings of the trial court and the Georgia Court of Appeals. Thus, since there was sufficient evidence to show that the Petitioner's arrest arose from information obtained from an independent source with the Drug Enforcement Administration, that neither the information gained from the issuance of investigative subpoenas by the Cobb County Police nor the wiretap of Petitioner's telephone had provided information leading to Petitioner's arrest or the seizure of evidence, and since it was inevitable

that Petitioner would have been arrested at the Bartow County Airport notwithstanding any subpoenas or wiretap surveillance by the Cobb County Police, this Court should find no merit to Petitioner's first or second arguments.

II. PETITIONER HAS NO STANDING TO CHALLENGE THE SUBPOENAS WHICH WERE SERVED ON THE NORTHWEST ANSWERING SERVICE AND THE SOUTHERN BELL TELEPHONE COMPANY.

Petitioner asserts that as the direct result of illegal subpoenas which were served on the Northwest Answering Service and the Southern Bell Telephone Company, police gained information which was utilized in obtaining a wiretap of his telephone, and thereafter information was learned through the wiretap which ultimately led police to the Bartow County Airport and resulted in Petitioner's arrest.

Respondent has already cited in the aforesaid statement of facts, the information which police authorities

possessed resulting from other than the subpoenas and wiretaps, and which alone justified the denial of Petitioner's motion to suppress. Additionally, Petitioner does not have standing to object to the issuance of the subpoenas which he claims initiated the illegal investigatory process which allegedly violated his Fourth Amendment rights.

Initially, the threshold question in any proceeding where a criminal defendant claims a Fourth Amendment violation is one of standing. Without standing to contest a search or seizure, its legality is of no consequence. Brown v. United States, 411 U.S. 223 (1973); Katz v. United States, 389 U.S. 347 (1967); United States v. Salvucci, 448 U.S. 83 (1980).

Of course the Fourth Amendment guarantees, " . . . [t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." Whether or not the Fourth Amendment has been violated, depends upon whether the person invoking its protection can claim a justifiable, reasonable or legitimate expectation of privacy that has been invaded by governmental action. Smith v. Maryland, 442 U.S. 735, 740 (1979) [cases cited].

Recently, in United States v. Miller, 425 U.S. 435 (1976), this Court addressed a similar question as has been presented in this case. In Miller, the defendant had moved to suppress copies of bank records which had been obtained by an allegedly defective subpoena. The defendant in Miller claimed that the subpoena was invalid because it was issued

by a United States district attorney rather than the clerk of the court, no return had been made to it, and it was returnable on a date when the grand jury was not in session. Upon receipt of the subpoena, the banks who were served allowed federal agents to examine and copy the defendant's bank record. After revealing this information, the banks were told that it would be unnecessary for them to appear before the federal grand jury. Id., at p. 437-438.

This Court found that there were no Fourth Amendment interests of the defendant implicated, because the defendant could not claim a reasonable or legitimate expectation of privacy, notwithstanding his argument that the bank records were simply copies of private financial transactions of the defendant. Id., at p. 442-443. In

finding the absence of a legitimate Fourth Amendment interest, this Court stated:

> This Court has repeatedly held that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and confidence placed in the third party will not be betrayed. Id., at p. 443, citing Hoffa v. United States, 385 U.S. 293, 302 (1966); Lopez v. United States, 373 U.S. 427 (1963); United States v. White, 401 U.S. 745, 752 (1971).

Just as in Miller, all records in possession of the third party answering service were there with the knowledge and consent of Petitioner Sacchinelli. They were prepared in the normal course of business and reviewed by the employees of the answering service, a commercial establishment. As in Miller, Petitioner

can claim neither ownership nor possession of the documents. Here, the Northwest Answering Service was invited as a third party to act as an intermediary between caller and subscriber. The subscriber had no reasonable expectation that one or more of the answering service operators would not view or reveal his messages.

Likewise, Petitioner cannot claim a reasonable expectation of privacy in the records of the Southern Bell Telephone Company. The obtaining of the telephone company records was no more intrusive than the use of a pen register. In Smith v. Maryland, 442 U.S. 735 (1979), this Court held that obtaining information pertaining to telephone numbers called by use of a pen register does not violate the Fourth Amendment interests of a telephone user who is the subject of the pen register usage.

Since no Fourth Amendment interest of the Petitioner has been implicated under the facts of this case, it should be governed by the general rule that the issuance of a subpoena to a third party to obtain records of that party does not violate the rights of a defendant even if a criminal prosecution is contemplated at the time the subpoena is issued. United States v. Miller, supra, at p. 444. Petitioner Sacchenilli has not shown standing and has no reasonable expectation of privacy which would confer standing upon him. A defendant who fails to establish standing may not complain of a Fourth Amendment violation. See Rakas v. Illinois, 439 U.S. 139 (1979).

III. THE AFFIDAVIT SUPPORTING THE STATE'S APPLICATION FOR ELECTRONIC SURVEILLANCE WAS SUFFICIENT.

Respondent has previously argued that Petitioner's motion to suppress evidence was justifiably denied because notwithstanding the service of subpoenas upon the Northwest Answering Service and the Southern Bell Telephone Company, the State had received independent information which led to Petitioner's arrest. Assuming arguendo this Court determines that an examination of the affidavit supporting the police authority's application for electronic surveillance is necessary, Respondent submits that a review of said challenged affidavit, in light of the totality of the evidence presented at trial, amply demonstrates the affidavit's sufficiency.

Petitioner's cite to Franks v. Delaware, 438 U.S. 154 (1978) fails to give proper emphasis to the appropriate language cited in that decision, which requires that before the constitutional validity of an affidavit may be successfully attacked, there must be a showing of a deliberate falsehood or reckless disregard for truth on the part of a governmental affiant. Id., at p. 171-172. Here, no showing was made to the trial court that any incorrect statement in the affidavit of Agent Pierce was included knowingly and intentionally or with reckless disregard for the truth. As the Georgia Court of Appeals noted upon reviewing the record, although some statements were shown to be incorrect, there was an insufficient showing that they were deliberately false. Sacchinelli v. State, supra, at p. 764. Respondent also submits that none of the incorrect statements had a material effect on the content of the affidavit.

Martin Dardis was shown to have been an investigator with the Dade County Attorney's Office rather than an Assistant State Attorney. (MT. 1389, 1398). Nevertheless, he was shown to have investigated Petitioner in relation to a possible cocaine purchase in Miami. (MT. 1398, 1426). On cross-examination, defense witness Riley indicated that the part of the affidavit to which he had personal knowledge, about Petitioner being in Miami for the purpose of buying cocaine, was true. (MT. 1427). Martin Dardis and witness Pierce had worked on the investigation together. (MT. 1423).

Petitioner also points to page 6 of the affidavit where Agent Pierce stated:

> Affiant further shows that on the 24th day of August, 1979, Sam Sarcinelli and Pamela Messina, along with another individual indicted by the Federal Grand Jury on the charges of conspiracy and possession with intent to distribute approximately 13 and two-tenths pounds of cocaine. The information related to affiant by members of the Drug Enforcement Administration in the month of September, 1979 and again in January, 1980. (Petitioner's Exhibit Appendix, p. 37).

Petitioner complains that the affidavit did not contain all the information concerning Sarcinelli and Messina, in that it included their arrest but not the dismissal by the court at a later date. A review of pages 5 and 6 of the affidavit shows that it does not include any information about a disposition of the case, but merely relates that a seizure of cocaine and currency was made from two individuals who were indicted. Both the seizure and the indictment were true and undisputed. A later dismissal on a motion

to suppress does not alter that truth.

As this Court may note on page 3 of the same affidavit, affiant related that a not guilty jury verdict was related with reference to a prosecution against a Mr. Forrest A. Roberts, who had been associated with a Mr. John Benson, a mutual acquaintance of the Petitioner. Id., at p. 34.

Petitioner's complaints pertaining to staleness of transactions recited in the affidavit, fails to recognize that affiant Pierce was reciting a continuing series of acts, which as a whole, went to establishing probable cause justifying the issuance of the surveillance order. In Bartisda v. Henderson, 487 F.2d 860, 864 (5th Cir. 1973), the Court noted that when an affidavit recites a mere isolated violation, then it is not unreasonable

to believe that probable cause quickly dwindles with the passage of time; but on the other hand if an affidavit recites activity which indicates a protracted or continuous conduct, time is of less significance. The affidavit of Agent Pierce was updated, when he presented it to the trial judge. (MT. 1087, 1088, 1305-1308). When considered as a whole, the affidavit was not stale.

In conclusion, Respondent submits that the affidavit and oral information submitted to the trial judge were sufficient to support the probable cause finding. The trial court reviewed the affidavit as a whole rather than in dissected parts as Petitioner would advocate. Finally, there was no adequate connection made between the electronic surveillance and Petitioner's ultimate arrest at the

Bartow County Airport, and no tapes resulting from the electronic surveillance were played at Petitioner's trial.

As a consequence, assuming this Court deems it necessary to review the sufficiency of the affidavit supporting the application for electronic surveillance, Respondent submits that in light of the record as a whole, this Court will conclude the affidavit is sufficient.

IV. THERE IS NO MERIT TO PETITIONER'S ASSERTION THAT AS A RESULT OF GOVERNMENTAL MISCONDUCT IN HIS CASE, THE BASIC TENENTS OF DUE PROCESS REQUIRE THE DISMISSAL OF HIS INDICTMENT.

Petitioner's final argument asserts that because of the flagrantly unlawful investigative techniques of the Cobb County District Attorney's Office and the Cobb County Police Department, the trial court, on due process grounds, should have utilized its inherent prerogative to dismiss the indictment which had been brought against Petitioner. Previously, this Court has utilized its authority to reverse a conviction when governmental conduct has been so outrageous as to offend the canons of decency and fairness

inherently incompassed within the due process clause of the Fourteenth Amendment to the United States Constitution. Rochin v. California, 342 U.S. 165 (1952). The facts of that case, however, are far removed from anything which occurred in Petitioner Sacchinelli's case.

In Rochin local police authorities illegally broke into the defendant's bedroom, struggled to remove suspected narcotics from his mouth, and being unsuccessful in that attempt, eventually extracted the contents of his stomach to obtain evidence against him. Viewing the overall circumstances of the case, this Court found that the governmental methods utilized in Rochin were too close to the rack and screw to permit constitutional differentiation. Id., at 172. Petitioner cites this Court to United States v. Russell, 411 U.S. 423 (1973), where in the course of that opinion

this Court stated,

> While we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction, . . . the instant case is distinctly not of that breed. Id., at p. 431-432, citing Rochin v. California, supra.

Petitioner asserts that the present case fits the exception recognized in Russell. However, like Rochin, Russell is clearly distinguishable. The Russell case was an entrapment case where the Court of Appeals had expanded upon the traditional notion of entrapment which focused on the predisposition of the defendant. The lower appellate court had indicated a dismissal was appropriate whenever a determination was made that there had been an intolerable degree of

governmental participation in the criminal enterprise. Id., at p. 427. This Court found that the Court of Appeals erroneously expanded the entrapment defense, and that the defendant had been an active participant in an illegal drug manufacturing enterprise which had begun long before the governmental agents appeared on the scene. He was not an unwary innocent but an unwary criminal. Id., at p. 436. Thus, the essential focus in the Russell case was centered upon criminal governmental activity as it was involved in the context of entrapment. Of course, there was no entrapment defense utilized in Petitioner's case, and the police were not engaged in criminal activity.

Although Petitioner condemns the actions of the Cobb County Police in utilizing a subpoena to gain access to the records of the Northwest Answering Service, it must be noted that the subpoena was not initially used in an

investigation of the Petitioner. Cobb County Police Officer David Sisson testified that he secured the original subpoena while investigating another case against individuals who were suspected of dealing in narcotics smuggling. Petitioner Sacchinelli was not one of these individuals. (MT. 520-521). During the investigation of that other case, Officer Sisson had discovered that several individuals had made calls to the Northwest Answering Service. Upon checking with the owner of the answering service, Ms. Bryant, Agent Sisson learned that Ms. Bryant felt several of her clients had been involved in drug smuggling and she gave him the names of Danny Benson and Steve Mussick. Apparently when Mussick had been arrested his messages were switched to Petitioner Sacchinelli. It was at this point that Agent Sisson

originally asked to see the records of Petitioner Sacchinelli. The initial subpoena was not secured until Ms. Bryant indicated that she wanted a subpoena before she would release her records to the police. (MT. 522-523). Thus it is apparent that when the initial subpoena was obtained for the Northwest Answering Service Petitioner Sacchinelli was not a prime suspect but was merely a peripheral character whose name appeared on the fringes of another, independent investigation. Moreover, contrary to Petitioner's assertions, the overwhelming evidence presented to the trial court demonstrated that actions and information received totally independent from the subpoenas ultimately resulted in Petitioner's arrest and the seizure of 995 pounds of marijuana. Nothing occurred in this case which rises to the magnitude

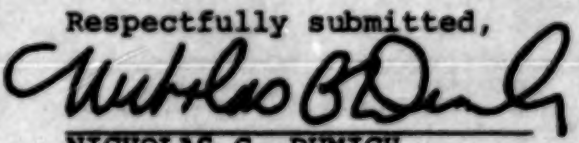
of the actions which were taken in Rochin. In fact, the facts of this case are quite similar to those as exhibited in United States v. Miller, supra, a case in which this Court reversed the granting of a motion to suppress evidence.

Since the actions taken by the Cobb County Police and participated in by the Cobb County District Attorney's Office were all taken in good faith, and since there was an entirely independent and unchallenged source of information which ultimately led to Petitioner's arrest, this Court should find that Petitioner's due process rights were not violated as a result of alleged governmental misconduct.

CONCLUSION

For all of the aforesaid reasons, this Court should deny the petition for writ of certiorari which has been filed in this case.

Respectfully submitted,



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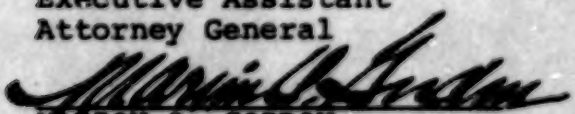

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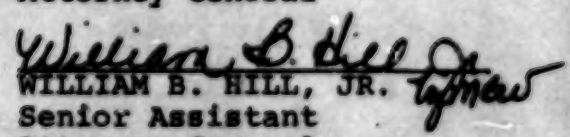

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CERTIFICATE OF SERVICE

I, Nicholas G. Dumich, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent, by depositing a copy of same in the United States mail, with sufficient postage affixed thereon, and addressed to:

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This 25th day of October, 1982.

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